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October 31, 1995

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

RE: In the Matter of Toll Free Service Access Codes
CC Docket No. 95-155

Dear Honorable Commissioners:

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The following comments are made on behalf of Service Merchandise Company, Inc. in reference to the Notice of Proposed Rulemaking for the referenced matter. A copy of this letter is being provided for each Commissioner.

Service Merchandise is a catalog showroom retailer which operates over 400 stores in 37 states, with annual sales exceeding \$4 billion dollars. Service Merchandise also operates a mail-order division which does over \$100 million dollars of sales per year. As a major subscriber of toll-free numbers, it currently uses toll-free telephone numbers, including several 1-800 vanity telephone numbers, for customer service purposes and mail-order services. During peak times of the year, the number of calls received per day for all of the various toll-free numbers can easily exceed 25,000. Many millions of copies of advertisements are distributed annually which advertise these various toll-free numbers, including the 1-800 vanity telephone numbers. As a result, toll-free numbers are critical to its business and the economy in general and necessarily, any new rules and regulations affecting toll-free numbers need to reflect the concerns of Service Merchandise and businesses similarly situated.

Service Merchandise urges the Commission to adopt rules concerning toll-free telephone numbers which will enable those companies that have significant investments and levels of use to protect their investments, to minimize customer/caller confusion and to minimize unfair competitive actions. This goal can best be achieved by rules that will (1) establish a toll-free telephone subscriber as a "Significant User" based on meeting a certain threshold of use; (2) permit a Significant User to have the right of first refusal to use the same toll-free number (whether or not a vanity toll-free number) on another Toll-Free Service Access Code ("corresponding toll-free number"); and (3) require significant use levels to maintain rights to use any toll-free number. Adoption of such rules will (1) provide each significant user of a 1-800 toll-free number (whether or not it is a vanity number) the opportunity to determine itself, if its amount of investment, level of use, and any other factors justify the investment in using and maintaining the corresponding toll-

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free number (and not place this responsibility with any governmental body); (2) prevent others from attempting to trade off of and otherwise taking advantage of the goodwill and name recognition associated with a Significant User's toll-free numbers; (3) prevent low volume users or non-users from obtaining their corresponding toll-free numbers and otherwise reduce the abuse in the assignment and warehousing of toll-free telephone numbers; and (4) minimize customer confusion between corresponding toll-free numbers. Such rules would also be consistent with the fact that most legitimate businesses will not want a toll-free number corresponding to one used by a high volume or Significant User.

Most companies which currently use toll-free vanity telephone numbers have invested substantial sums in making this number well known to their customers. The same is also true of most businesses with toll-free numbers which have easily recognizable number patterns. It is impossible to write rules to fairly determine which subscribers will receive preferential treatment when a new toll-free service code becomes available. The FCC should not discriminate between toll-free subscribers with significant use of their toll-free number(s) and should permit all such subscribers to have the right of first refusal to obtain their corresponding toll-free number(s) in any new toll-free Service Access Code. While at first blush this may seem to create a procedure that will cause too many numbers to be used up, strict minimum usage level requirements, practical constraints on using and advertising too many different telephone numbers, and the additional cost will deter businesses from securing too many numbers.

Liberal rights for current toll-free telephone number subscribers to protect their toll-free numbers also benefits consumers and new subscribers in new toll-free service access codes. Given the propensity of people to mix up telephone numbers, customers will dial the wrong service access code when making a toll-free call. Regardless whether a toll-free number is a vanity number or not, wrong numbers will be a problem. If a current toll-free number subscriber heavily advertises its toll-free number and receives several thousand calls per day, and a second subscriber for a new toll-free Service Access Code has the corresponding toll-free number, then the second subscriber runs a major risk of receiving a large number of wrong numbers. The low volume second subscriber may have an inordinate proportion of its telephone bill based on the wrong numbers from customers trying to reach the first subscriber. Furthermore, both businesses will lose sales because a certain percentage of customers will not redial the correct number.

A right of first refusal for any toll-free telephone subscriber also relieves the Commission from any responsibility to protect any trademark or service mark rights of subscribers. Any subscriber having such rights can protect them by exercising their right of first refusal and utilizing the new toll-free telephone number. This is far less expensive than any legal action.

A variation on the right of first refusal procedure should also be implemented to encourage the current subscriber to release its claim to the corresponding toll-free number. A current subscriber could be permitted to authorize release of the corresponding number to any entity agreeing to comply with certain use restrictions. These restrictions could include not using the vanity name and/or not using the number for a particular purpose or in a particular industry. For example, a mail-order company selling consumer electronics may have no problem if a subsequent subscriber in the wholesale book business uses the corresponding toll-free number, provided they agree not to use the same vanity name and not to use the number for a mail-order business. The remedy for breach of these restrictions can be immediate loss of the right to use the number.

Most potential subscribers in a new toll-free service access code will probably not want a toll-free telephone number corresponding to that for a high volume user because of the nuisance of receiving wrong numbers, the inconvenience to their customers, and the costs resulting from these problems. In other words, there are probably a significant quantity of the corresponding toll-free numbers that no one will want because of these potential problems, and the proposed regulations need to take this fact into consideration. "Blacking out" of toll-free numbers corresponding to very high volume toll-free numbers should be seriously considered.

Another issue not raised in the Notice is the ability of a potential subscriber to a new toll-free service access code to have the ability to find out the subscriber to the corresponding toll-free number in other service access codes. This information needs to be made available so that problems between subscribers to corresponding toll-free numbers can be minimized and avoided if possible.

The following are comments to some of the particular questions raised in the Notice of Proposed Rulemaking, which were not addressed above. The paragraph numbers correspond to the paragraph numbers in the Notice.

13. Making Toll-Free Numbers Available to Subscribers Who Have Not Requested Them.

The FCC should not permit assignment of toll-free numbers to any subscribers except in response to a request initiated by such subscriber.

14. Charges for Reserving Toll-Free Numbers.

Charges for toll-free numbers reserved is an acceptable way to reduce the numbers reserved. However, minimum usage requirements at a realistic level will have more of an effect to prevent warehousing of toll-free telephone numbers. Use of escrow accounts, etc. merely seeks to increase the bureaucratic levels required for administration of the programs, as well as the potential for abuse, and should not be implemented.

16. Proof of Use of a Toll-Free Telephone Number.

Minimum usage levels need to be established for a subscriber to maintain a toll-free telephone number. The levels of usage required need to be sufficient to weed out those that may warehouse or broker toll-free telephone numbers, but not be so high as to be unfairly discriminatory against small businesses. The procedures should be simple enough to not require a large bureaucracy for overseeing the usage requirements.

18. Lag Time.

The current 60 day period for maintaining a toll-free number in reserve status is satisfactory. Reducing this time period will have little or no effect on warehousing or brokerage problems. If it is to be reduced, the reserve status period should not be reduced to less than 45 days.

With respect to the length of time a toll-free number can be assigned, but not working, a reduction from twelve months to four months is not appropriate. With print advertising lead times of several months, planning time, hiring of staff and other related issues for starting a new business, at least a six to nine month period is necessary.

20. Personal Identification Numbers.

As a retailer with a mail-order department, we are of the opinion that use of a PIN would be unnecessarily burdensome on our customers and result in an increase in the dialing of wrong numbers. There may be businesses where use of a PIN would be acceptable, but when dealing directly with a large volume of customers, use of a PIN would be unworkable.

23. New Toll-Free Codes. Lottery for Initial Requests of Same Number.

When the new service access code is initially made available, a certain period of time should be allotted for potential subscribers to request certain numbers (e.g. 60-90 days). To the extent that a subscriber fails to exercise its right of first refusal, a lottery would suffice to select a subscriber from all entities requesting the same number. This procedure should also carry with it the restriction that the subscriber winning the lottery would have to meet the same usage levels of all other toll-free subscribers and that the number could not be transferred by the subscriber to another subscriber until passage of a certain period of time after usage requirements have been in effect. This would help ensure that the subscriber was a legitimate subscriber and not one seeking to obtain a number for the purpose of warehousing or selling to another entity.

After the expiration of the initial request period, then toll-free numbers not yet assigned should be available on a first-come, first-serve basis.

24. Phased Introduction of New Toll-Free Service Access Codes.

If the requirements to prevent warehousing and brokerage of toll-free telephone numbers are properly written and enforced, the quantity of "888" numbers will probably not be used up in the initial offering. If the procedure outlined above in Paragraph 23 is applied, and the requests for numbers exceeds the supply, then appropriate procedures need to be implemented for minimizing the quantity of numbers assigned to each entity and for further use of lotteries.

32. Provisions for Prevention of Warehousing Toll-Free Numbers.

In addition to the points mentioned in the above discussion, limitations on transfer of toll-free telephone numbers can be implemented to reduce warehousing. However, such provisions need to recognize there are situations where a subcontractor or agent for an entity may be using a particular toll-free telephone number and this entity may need to require its agent to transfer the toll-free number to a replacement subcontractor or agent. These types of transfers should not be precluded since the real beneficiary of the number still remains the same (assuming that the minimal use requirements are met).

34. Certification to the Commission on Use of Particular Toll-Free Numbers.

The proposals outlined in the Notice under this paragraph are generally acceptable, providing the bureaucracy overseeing use verification is minimized.

40. Use of Federal Trademark Law to Protect Vanity Names.

Federal trademark law may be available in some cases to protect a name used in a vanity toll-free number if the name can meet the requirements for being a trademark or service mark. A number of vanity names, however, are essentially generic terms for the goods and services offered, and cannot be protected under trademark law. While they may have achieved a level of secondary meaning, enforcement can be a long, expensive and uncertain process. Therefore, it is important to give the current user the right of first refusal since no other reasonable alternative is available to prevent others from using the current user's vanity name.

45. Use of SIC Codes.

Use of SIC codes to help prevent competing businesses from using corresponding toll-free telephone numbers is a possible alternative, but it still does not address all problems. First, implementation would possibly require an unacceptable level of bureaucracy. Second, SIC codes may not be totally effective to predict whether one business is competitive with the next. Problems of confusion and unfair competition could still result. As discussed above, the right of first refusal and strict usage requirements provide a better alternative for current subscribers than using the SIC code method.

46. Miscellaneous Proposals.

Service Merchandise does not support the reservation of corresponding toll-free vanity numbers until the end of the toll-free assignment pool. Such action would only serve to delay but not eliminate the problems discussed above.

Service Merchandise does not support the use of a transitional gateway intercept, since such is confusing to customers, and requires substantial additional expense.

Service Merchandise can support the partitioning of toll-free service, leaving business entities and the majority of vanity number holders to use the 800 toll-free service access code and allow non-commercial, personal and pager use for other toll-free service access codes. This would necessarily require transfer of current non-commercial 800 users to new toll-free service access codes.

In conclusion, it is submitted that implementation of a right of first refusal for the current 1-800 toll-free telephone number subscribers in conjunction with strict minimum usage requirements can serve to protect the rights of current 1-800 toll-free telephone number subscribers, provide better consumer service, reduce acts of unfair competition and to promote the better distribution of toll-free telephone numbers.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gary V. Pack".

Gary V. Pack
Senior Corporate Attorney
(615) 660-3215

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